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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applicant	Energyworx Solutions & Services B.V
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

*In re* Application of : Energyworx Solutions & )  
Services B.V. )

) **BRIEF FOR APPELLANT**

Serial No.: 79/152,257 )

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Mark: ENERGYWORX (and design) )

Assistant Commissioner for Trademarks  
Board of Appeals, 9th Floor  
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## **APPEAL BRIEF**

Appellant-Applicant Energyworx Solutions & Services B.V. (“Applicant”) hereby files this Appeal Brief in response to the Examining Attorney’s Denial of Applicant’s Request for Reconsideration dated February 29, 2016. Applicant appeals the Examining

Attorney’s refusal of registration of the stylized mark



(“Applicant’s Mark”) because, in the Examining Attorney’s view, the mark creates a likelihood of confusion with U.S. Registration No. 2304418 for ENERGYWORKS (“Cited Mark”) owned by Energyworks North America, L.L.C. (“Registrant”).

Applicant respectfully submits that the Examining Attorney’s refusal based on likelihood of confusion is improper. Comparing the marks in their entirety, comparing services associated with the respective marks, considering the weak source identifying nature of the terms “energy” and “works” in combination for the relevant goods/services and considering the channels of trade and sophistication of consumers, there is no likelihood of confusion between Applicant’s mark and the cited mark. Accordingly, Applicant respectfully requests that the Trademark Trial and Appeal Board (“the Board”) reverse the Examining Attorney’s decision and allow the application to proceed to registration.

### **I. ARGUMENT**

The law is well settled that the United States Patent and Trademark Office may refuse to register a trademark that so resembles a registered mark “as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. §1052(d). Whether a likelihood of confusion exists between a cited mark

and an applicant's mark is determined on a case-specific basis, applying the factors set out in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (CCPA 1973), including the following which are particularly relevant here:

- the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- The number and nature of similar marks in use on similar goods
- the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use;
- the similarity or dissimilarity of established, likely-to-continue trade channels;
- the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing.

An analysis of these factors leads to the conclusion that no confusion will result amongst the purchasers of the respective services associated with Applicant's Mark and the Cited Mark. As more particularly set out below, the Cited Mark is inherently weak making the substantial differences between the Cited Mark and Applicant's Mark as well as the distinct services of enhanced significance. Furthermore, the respective services are provided to distinct purchasers within the same general field of energy and utilities industries for entirely distinct purposes. Accordingly, there is no likelihood that the relevant purchasers would be confused as to the source of Applicant's and the Registrants' respective services.

The Office has refused registration of Applicant's mark, stating that it is confusingly similar to the following mark:

Registration No. 2304418 for ENERGYWORKS for installation of energy systems, construction of power plants in Class 37;

Distribution and transmission of electrical power in Class 39; and

Energy management services, energy design and engineering services, providing energy auditing and feasibility studies, product research and development, research in the energy field, development of projects in the energy field in Class 42.

(the “Cited Mark”).

Registration of Applicant’s Mark  is sought for the

following services:

Computer software, namely, computer programs for electronic data processing and transmission; computer software used for data aggregation and analytics for the energy and utilities industry in Class 9;

Telecommunications services, namely, transmission of data from sensors and meters used in the field of energy and utilities industry via cellular telephone, internet, and satellite in Class 38; and

Application service provider, namely, providing, hosting, managing, developing and maintaining software, web sites and databases in the field of data aggregation and analytics within the energy and utilities industry; providing on-line, non-downloadable software as a services for data collection from metering equipment, sensors and other software systems in Class 42.

**A. The Marks Differ In Sight, Sound, and Commercial Impression and the Cited Mark is Weak**

As an initial mater, Applicant’s Mark , is highly stylized.

It is well settled law that in undertaking a “likelihood of confusion” analysis, the marks must be compared in their entirety (as a whole) as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005). Applicant respectfully submits that the Examining Attorney erred in his analysis of the first DuPont factor, the similarity or dissimilarity of the cited mark and the Applicant’s mark, by focusing only on the word component of the Applicant’s Mark. The similarity or dissimilarity of the marks in their entirety is to be

considered with respect to appearance, sound, and connotation. *See DuPont*, 476 F.2d at 1361; *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 202-03, 22 U.S.P.Q.2d 1542, 1544-45 (Fed. Cir. 1992). All relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar. *See Olde Tyme Foods*, 961 F.2d at 203, 22 U.S.P.Q.2d at 1545; *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 U.S.P.Q. 749, 751 (Fed. Cir. 1985). While it is understood that more or less weight may be given to a particular feature of a mark, this conclusion must rest on consideration of the marks in their entireties. *See In re Nat'l Data Corp.*, 753 F.2d at 1058.

Importantly, where senior marks substantially comprise weak source identifying elements, the differences between senior marks and junior marks assumes enhanced significance. A weak or commonplace mark is entitled to less protection than a strong and distinctive mark. *Sure-Fit Products Co. v. Saltzen Drapery Co.*, 254 F.2d 158, 160, 117 U.S.P.Q. 295 (C.C.P.A. 1958); *Waples Platter Cos. v. General Foods Corp.*, 439 F. Supp. 551, 575, 196 U.S.P.Q. 50, 71 (N.D. Tex. 1977) (“The relative strength of a trademark is but a legal shorthand for the breadth of protection to be afforded the mark.”). If the common element of conflicting marks is a word that is “weak”, then this reduces the likelihood of confusion. *Nestle's Milk Products, Inc. v. Baker Importing Co.*, 182 F.2d 193, 195, 86 U.S.P.Q. 80, 83 (C.C.P.A. 1950) (HYCAFE, NESCAFE); *Clark Equipment Co. v. Baker-Lull Corp.*, 288 F.2d 926, 929, 129 U.S.P.Q. 220 (C.C.P.A. 1961) (no confusion between YARDLOADER and CARLOADER or YARDLIFT on fork-lift trucks). Further, in the case of weak marks, even slight differences between the marks may be deemed sufficient to avoid a finding that confusion is likely. *See In re Dayco Products-Eaglemotive Inc.*, 9 U.S.P.Q.2d 1910, 1912 (TTAB 1988) (“As such, we find the term to be a



relatively weak mark and we agree with applicant that the scope of protection afforded such a mark is considerably narrower than that afforded a more arbitrary designation.”).

As an initial matter, ENERGYWORKS is descriptive or at least highly suggestive of “installation of energy systems and power plant construction” in Class 37 and “energy management services” in Class 42, the very services in the description of services of the Cited Registration relied upon by the Examining Attorney in finding the services are “related” (which will be discussed further below) in the Final Office Action dated October 27, 2015. “Energy” of course describes the field of the energy and utilities industries and “works” describes the energy or utility plants to which the services are directed. The descriptive nature of ENERGYWORKS make it an inherently weak mark.

In addition, of record are three marks in addition to the Cited Mark that include the terms “energy” and “work”, yet coexist on the register for goods and services at least as closely related to each other and the Cited Mark as the services associated with Applicant’s Mark:

1. Registration No. 3859463 for ENERGY WORKBENCH for providing on-line non-downloadable software for monitoring, tracking, analyzing, aggregating and reporting energy use, demand and cost for non-residential facilities of corporate, institutional and governmental entities in Class 42;
2. Registration No. 4529992 for @ENERGY/POWERWORKS for Downloadable computer software for use in financial analysis, financial valuation and risk management in the field of power in Class 9; and
3. Registration No. 2,395,200 for ENERGY@WORK for Utility services, namely the distribution of electricity and gas in Class 39.

(Collectively, the “Other “energy” and “work” Marks”).

The coexistence on the Register of these marks reinforces that Registrant's Mark is a weak source identifier. Accordingly, the necessity of comparing the marks as a whole and the distinctions between the marks as a whole as well as differences in the respective goods and services not only cannot be neglected, but are of critical importance.

Here, the Examining Attorney considered only the similar commercial impression of similar but weak portions of the marks – without regard to the distinctive stylization (or design) of the Applicant's mark, including the elements of the distinctive colors scheme, the bolding of “energy”, the exclusive use of lowercase letters and the unique fonts – in concluding that the marks were similar. When viewed in their entireties and properly considering the weakness of the similar elements of the marks, Applicant's Mark is clearly distinguishable from the Cited Mark. In determining confusing similarity, a design mark (like any mark) must be viewed as a whole. The stylization (or design) element in the Applicant's Mark has not been properly considered by the Examining Attorney. The Board has repeatedly held that a design element in a mark can sufficiently distinguish the mark from others despite shared textual elements. None of the design and fanciful stylization elements are present in the Cited Mark. Further, Applicant's Mark contains the distinctive final “X.”

Consequently, while there is some overlap in sound and connotation between the word portion of Applicant's Mark and the Cited Mark, there are substantial differences preventing a likelihood of confusion. Courts have found in many instances that small differences in sight may be sufficient to distinguish marks. *In re Coors Brewing Co.*, 343 F.3d 1340, 1344, 68 U.S.P.Q.2d 1059 (Fed. Cir. 2003) (Registration of BLUE MOON and design for restaurant services was found not confusingly similar to BLUE MOON and a distinct design for beer). The differences between Applicant's Mark and the Cited Mark are at least as substantial as the

differences between the Cited Mark and the Other “energy” and “work” Marks and thus avoids confusion.

**B. The Relevant Goods and Services and Channels of Trade Differ**

The Examining Attorney has failed to properly consider the substantial differences in the services, as well as differences in channels of trade offered under these Cited Mark and Applicant’s Mark. These factors can be determinative in the confusion analysis. *See Borg-Warner Chemicals, Inc. v. Helena Chemical Co.*, 225 U.S.P.Q. 222, 224 (TTAB 1983). Full consideration of the differences here compels a conclusion of no likelihood of confusion with the Cited Mark.

Registrant Energyworks, LLC, is a traditional engineering, procurement, and construction (EPC) company (*See Exhibit B to Office Action Response dated October 7, 2015*). According to the Registrant’s website its mission is:

"EnergyWorks’ mission is to create and implement energy and infrastructure solutions that maximize economic value, protect the environment and enhance communities." Exhibit A to Request for Reconsideration dated January 27, 2016.

According to Registrant’s website they have three divisions:

- Infrastructure management
- Windpower
- Biopower

Exhibit B to Request for Reconsideration dated January 27, 2016

While the description of goods/services in registration of the Cited Mark forms the basis for comparison of the respective marks, the actual services with which the Cited Mark is used informs how the services description should be understood as well as the target customers and

channels of trade. This is particularly true when, as here, a cited mark uses terminology so broad as to extend to virtually any service that could be offered within a field. *Cf. In re Trackmobile Inc.*, 15 USPQ2d 1152, 1154 (TTAB 1990, non-precedential) (noting that, "when the description of goods for a cited registration is somewhat unclear . . . it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade."); *see also In re Spinal USA*, Appeal No. 85386705 (TTAB June 21, 2013) ("the examining attorney appears to overreach in the presumption that applicant's medical and surgical goods are of the type described in registrant's identification of orthopedic footwear and related goods.")

Here, "energy management services" is so vague it is almost without limitation. In fact, the Trademark ID Manual requires that "energy management services" be used in conjunction with the precise nature of the services. For example, "Energy management services, namely, providing a service that allows customers to purchase energy from various energy providers".

From both the goods/services description and its website, it is clear that Registrant has a "...primary focus on project management and field services for wind power generation, integrated infrastructure management for business and institutions, and the development of advanced technology bio-energy projects". Exhibit A to Request for Reconsideration dated January 27, 2016. It carries out detailed engineering design of energy related projects, procures all the equipment and materials and then constructs to deliver a functioning facility to its clients.

Applicant's services description makes clear that Applicant does not supply infrastructure components and metering equipment, nor does it install these for its customers. To the contrary, as evident from the description, Applicant merely receives data from its customers which can be

grid operators, energy retailers, energy producers, or the like, that Applicant processes and analyzes. This "big" data is then made available to its customers for diverse purposes, helping the energy industry in their transformation from a commodity driven focus to a data-driven focus.

Applicant Energyworx is focused on enabling the energy evolution by making sure that the energy world can keep pace with the immense and ever growing data from the smart grid and its meters and get value out of it. Thus, Applicant focusses on the data that can be gathered from the energy infrastructure but moreover other information sources such as "smart" thermostats, "solar panels", "heating systems", "weather data", "website click behavior" and correlating this data to obtain new value from it. In short, Applicant delivers a data crunching service from a cloud perspective. This is clear from Applicant's description of services in classes 9, 38 and 42. These services are illustrated in Exhibit C to Request for Reconsideration dated January 27, 2016.

Accordingly, the differences can be distilled to Applicant only supplies data intelligence services using data from energy and utility companies and other Internet Of Things related data and information and Registrant delivers hardware equipment for infrastructure and implementation/installation of that infrastructure mainly in wind and bio energy industries. The Examining Attorney's confusion analysis relies almost entirely upon the notion that because both Applicant and Registrant market to the energy and utilities industries and possibly in some instances the same entities within the energy and utilities industries, they necessarily direct their services to the same purchasers. But such a general conclusion ignores the reality that the services are directed to distinct purchases within energy and utilities industries and even the same entities. Where, as here, the services are of a nature that they would be directed to distinct

purchasers, no likelihood of confusion should be found. *See Borg-Warner Chemicals, Inc. v. Helena Chemical Co.*, 225 U.S.P.Q. 222, 224 (TTAB 1983) (“The Board in the past has found no likelihood of confusion even with respect to identical marks applied to goods and/or services used in a common industry where such goods and/or services are clearly different from each other *and there is insufficient evidence to establish a reasonable basis for assuming that the respective goods as identified by their marks, would be encountered by the same purchasers.*”(emphasis added)); *Checkpoint Sys. v. Check Point Software Techs., Inc.*, 269 F.3d 270, 286-287, 60 U.S.P.Q.2d 1609, 1620 (3<sup>rd</sup> Cir. 2001) (CHECKPOINT for physical security services and CHECK POINT for data security services fall into distinct sectors of a broad product category and are sufficiently unrelated such that confusion is unlikely). *See also UMC Industries, Inc. v. UMC Electronics Co.*, 207 U.S.P.Q. 861, 879 (TTAB 1980) (“[T]he fact that one term, such as “electronic”, may be found which generically describes the goods of both parties is manifestly insufficient to establish that the goods are related in any meaningful way.”); *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 U.S.P.Q. 2d 1399, 1410 (T.T.A.B. 2010) (precedential) (“[A] finding that the goods are similar is not based on whether a general term or overarching relationship can be found to encompass them both.”); *W.W.W. Pharm. Inc. v. Gillette Co.*, 984 F.2d 567, 573, 25 U.S.P.Q.2d 1593, 1598 (2d Cir. 1993) (even though both may be generally defined as personal care products, SPORTSTICK for lip balm and SPORT STICK for deodorants/antiperspirants are not related or confusingly similar because they “do not compete nor serve the same purpose”); *Therma-Scan Inc. v. Thermoscan Inc.*, 295 F.3d 623, 632, 63 U.S.P.Q.2d 1659, 1663 (6th Cir. 2002) (THERMA-SCAN for infrared medical imaging services and THERMOSCAN for electronic ear thermometers are not sufficiently related to cause confusion even though marks coexist in same broad industry).

Given the weight of legal authority to the contrary, the mere fact that Applicant's Mark and the Cited Mark both cover some form of service in the energy and utilities industries, without more, cannot support a finding that respective services are related. That is particularly true where, as here, the function, purpose and fields of the respective offerings are distinct. The services specified in connection with Applicant's Mark and the Cited Mark, the parties' actual respective service offerings under the mark, established legal authority, and the realities of the marketplace compel the conclusion that reasonably prudent purchasers would not believe that Applicant's Software as a Service for collecting and transmitting data related to energy and utilities industry would emanate from or be associated with Cited Registrant's services for designing and constructing power plants or distribution of electric power or "energy management" and auditing services. For all of the foregoing reasons, Applicant's services cannot be considered "related" to the Cited Mark's services for likelihood of consumer confusion purposes.

**C. The Sophistication of the Relevant Consumers and Expensive Nature of the Services Further Ensures the Unlikelihood of Confusion**

The level of sophistication of the purchasers of Applicant's services, as well as those of the Cited Registrant's, further diminishes any likelihood of confusion. It is well settled that, "Sophistication [of consumers] is important and often dispositive" because "[s]ophisticated consumers may be expected to exercise greater care." *See Electronic Design & Sales, Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 718, 21 U.S.P.Q.2d 1388, 1392 (Fed. Cir. 1992) (internal citation omitted). Consumers who exercise a great care in purchasing goods and services are less likely to be confused about the quality of goods/services or their origin and mitigates against confusion.

Applicant respectfully submits that the Examining Attorney did not give adequate weight to Applicant's "Sophistication of Purchasers." The Examining Attorney states: "The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion." See Final Office Action dated October 27, 2015, p. 3. Yet neither *Du Pont* nor any other case requires that consumers be "sophisticated or knowledgeable" about the deeply complex legal arena of trademarks, or "immune" from confusion. Applicant believes that by requiring Applicant to reach these two thresholds, the Examining Attorney has set an unrealistically high bar unsupported by precedent.

The relevant purchasers of Applicant's and Cited Registrants' services are considered professional and commercial purchasers. When the relevant buyer class is composed of professional or commercial purchasers, it is reasonable to set a higher standard of care than it is for ordinary consumers, since it is assumed such professional buyers are less likely to be confused than the ordinary consumer. *Oreck Corp. v. U.S. Floor Systems, Inc.*, 803 F.2d 166, 173, 231 U.S.P.Q. 634 (5th Cir. 1996), rehearing denied *en banc*, 808 F.2d 56 (5th Cir. 1986), cert. denied 481 U.S. 1069 (1987). In *Oreck*, the court stated that "because these persons are buying for professional and institutional purposes at a cost in the thousands of dollars, they are virtually certain to be informed, deliberate buyers ... this is not the sort of purchasing environment in which confusion flourishes." *Id.* When different goods are sold, even under a similar mark, to different discriminating purchasers, there is no likelihood of confusion. *Dynamics Research Corp. v. Langenau Manufacturing Company*, 704 F.2d 1575, 1576, 217 U.S.P.Q. 649 (1st Cir. 1983).



The services associated with the Registered Mark are directed to builders and operators of power plants and power distribution systems costing millions of dollars. The purchasing decisions would be guided by sophisticated engineers and business analysts over purchase cycles that span years. Any purchase would involve protracted negotiations and consummation through formal contracts. Clearly, such knowledgeable, sophisticated executives are not likely to conclude that Registrant's services offering design, engineering, and construction of such power plants are related to Applicant's Software-as-a-Service for collecting and transmitting energy related data simply due to similarity of commonly used terms in the power and utilities industry in the respective service marks. As such, the sophisticated nature of the relevant purchasers and the expensive nature of the relevant services combine to ensure that purchasers would not be confused by the registration of Applicant's Mark.

Moreover, nowhere in the Office Action is stated that the particular individuals who would be responsible for purchasing Applicant's SaaS for collecting and transmitting data related to energy and utilities industry and other specialized industrial entities would also be the same group of buyers who would select and purchase services involving design and construction of power plants, managing and monitoring transmission and distribution of electricity to those entities.

As set forth in *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1206, 220 U.S.P.Q. 786, 791 (1<sup>st</sup> Cir. 1983), for a likelihood of confusion to exist, "it must be based on confusion of some relevant person; i.e., a customer or user, and there is always less likelihood of confusion where goods [or services] are expensive and purchased and used by highly specialized individuals after careful consideration." Here, the services at issue on their face are not only distinctly different, but they clearly are very expensive and would be bought

only by highly knowledgeable, discriminating and sophisticated purchasers after thorough deliberation rather than on impulse. "...Sophistication is important and often dispositive because sophisticated end-users may be expected to exercise greater care." *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, , 954 F.2d 718.

In summary, it is respectfully submitted that the services offered by Applicant and Registrants could not, under any circumstances, be considered an impulse or casual purchase. Moreover, the services associated with Applicant's Mark and the Cited Marks typically involve entering of contracts for recurring or continued services, such as maintenance and resupply contracts, as well as in cyclic billing. Thus, this is not a one-time purchase and would certainly result in customers paying close attention to the source of the services.

## II. CONCLUSION

When determining whether an applicant's mark creates a likelihood of confusion with a mark covered by a cited registration, "[a] showing of mere possibility of confusion is not enough; a substantial likelihood that the public will be confused must be shown." *Omaha Nat'l Bank v. Citibank (S.D.), N.A.*, 633 F. Supp. 231, 234, 229 U.S.P.Q. 51 (D. Neb. 1986). Applicant submits that the relevant factors discussed above clearly support registration of Applicant's mark and do not raise a substantial likelihood of confusion. Applicant respectfully requests that the Board reverse the Examining Attorney's rejection and allow the application to proceed to publication.

Respectfully submitted,

/TD Bratschun/

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